92-1767

No. _____

Supreme Court, U.S.
FILED
MAY 7 - 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

CHRIS J. WHITE,

Petitioner

v.

THOMAS RUSSELL COONEY AND
LORA JOHN COONEY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE WYOMING SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a prosecutor's actions in initiating a probation revocation proceeding, on the basis of a perjured petition, are not entitled to absolute immunity simply because those activities occurred outside the courtroom and were not under the direct supervision of a judge.

PARTIES TO THE PROCEEDING

The Respondents, plaintiffs below, originally filed suit against defendants Park County, Wyoming; the State of Wyoming; the Wyoming Department of Probation and Parole; Robert Mayor, a probation officer with the Department; and Chris J. White, deputy county attorney for Park County. As was the case in *Cooney v. White*, ____ U.S. ____, 111 S.Ct. 2820, 115 L.Ed.2d 965 (1991), Chris J. White is the only defendant below with an interest in the outcome of this petition before this Court and, thus, is the sole Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE WYOMING SUPREME COURT

The Petitioner, Chris J. White, respectfully requests that this Court grant a petition for writ of certiorari, seeking review of the judgment and opinion of the Supreme Court for the State of Wyoming.

DECISION BELOW

The initial decision on the question of the scope of the immunity to which Petitioner was entitled was rendered by the Honorable John T. Dixon, District Court Judge for the Fifth Judicial District, Park County, Wyoming. The district court dismissed Respondents' claims against Petitioner on the grounds that Petitioner was entitled to absolute immunity for his actions in initiating a probation

revocation proceeding against Respondent Thomas Russell Cooney. The district court's decision was appealed to the Wyoming Supreme Court, which in 1990 held that Petitioner's challenged activities were intimately associated with the judicial phase of the criminal process and shielded by absolute immunity. *Cooney v. Park County*, 792 P.2d 1287 (Wyo. 1990) [*Cooney I*].

Respondents then sought a writ of certiorari from this Court. In *Cooney v. White*, ____ U.S. ____, 111 S.Ct. 2820, 115 L.Ed.2d 965 (1991), this Court vacated the Wyoming Supreme Court's decision and remanded the case "for further consideration in light of *Burns v. Reed*, 500 U.S. ____ (1991)." On December 31, 1992, the Wyoming Supreme Court issued its opinion on remand. *Cooney v. White* [*Cooney II*] is reported at 845 P.2d 353 (Wyo. 1992), and is reprinted in the Appendix beginning on page 2.

Counsel for Petitioner White filed a petition for rehearing, which was denied on February 9, 1993. *See Cooney v. White*, 845 P.2d 353 (Wyo. 1992). A copy of that order is reproduced in the Appendix on page 47.

JURISDICTION

Respondents' claims against Petitioner White alleged violations of 42 U.S.C. § 1983, and of rights, privileges and immunities guaranteed under the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution. This Court has jurisdiction to review this matter pursuant to 28 U.S.C. § 1257.

APPLICABLE STATUTES AND RULES

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Wyo. Stat. § 7-13-305 (1987):

> (a) The period of probation or suspension of sentence under W.S. 7-13-302 shall be determined by the court and may be continued or extended.
>
> (b) Upon the satisfactory fulfillment of the conditions of suspension of sentence or probation under W.S. 7-13-302 the court shall enter an order discharging the defendant.
>
> (c) For a violation of a condition of probation occurring during the probationary period, revocation proceedings may be commenced at any time during the period of suspension of sentence or probation under W.S. 7-13-302, or within thirty (30) days thereafter, in which case the court may issue a warrant and cause the defendant to be arrested. If after hearing the court determines that the defendant violated any of the terms of probation or suspension of sentence, the court may proceed

to deal with the case as if no suspension of sentence or probation had been ordered.

(d) The time for commencing revocation proceedings shall be automatically extended for any period of time in which the probationer is incarcerated outside this state during the probationary period for the conviction of any offense which is a violation of the conditions of probation, unless the probationer has made a valid request for final disposition under the interstate agreement on detainers. W.S. 7-15-101 through 7-15-106 [§§ 7-15-101 through 7-15-105].

Rule 33(f), Wyoming Rules of Criminal Procedure (1957):

The court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing.

Rule 39(a), Wyoming Rules of Criminal Procedure (1992):

Proceedings for revocation of probation shall be initiated by a petition for revocation filed by the attorney for the state, setting forth the conditions of probation which are alleged to have been violated by the probationer and the facts establishing the violation.

STATEMENT OF THE CASE

In 1985, Respondent Thomas Cooney pled guilty to felony fraud by check. The district court in Park County, Wyoming, sentenced him to five years of supervised probation. Respondent's probation depended upon fulfilling several conditions, including maintaining contact with the Wyoming Department of Probation and Parole and notifying the department prior to changing his residence. *Cooney I*, 792 P.2d at 1288.

Respondent's supervising agent gave him permission to move to Baroil, Wyoming, due to a change in his job. Respondent's file was forwarded to a probation officer in Rawlins, Wyoming, who was incorrectly advised that Respondent was living in La Barge, instead of Baroil. Respondent's file was then forwarded to Robert Mayor, a probation officer stationed in Evanston, Wyoming. Mr. Mayor's attempts to locate Respondent in La Barge were unsuccessful, because Respondent was in Baroil. *Id.*

In early 1986, Mr. Mayor contacted Respondent's original probation officer to inform her that he could not locate Respondent. Although the original officer had heard from Respondent during the intervening months, for some reason she told Mr. Mayor that she had not heard from Respondent since his move to Baroil. At that point, Mr. Mayor contacted Petitioner White, who was then serving as deputy county attorney for Park County, Wyoming. Mr. Mayor told Petitioner White that Respondent had failed to comply with the terms of his probation, whereupon Petitioner White asked Mr. Mayor to prepare a petition to revoke Respondent's probation. *Id.* at 1289.

Mr. Mayor then learned that Respondent had moved to Baroil, not La Barge, that he had permission to be there,

and that he had maintained contact with his original supervising officer. This information was conveyed to Petitioner White, who reiterated his request for Mr. Mayor to draft a revocation petition. The completed petition was presented to the district court, which issued a bench warrant for Respondent's arrest. Respondent was arrested on March 15, 1986, and remained incarcerated in the Park County jail until April 21, 1986, when the district court denied the revocation petition and released Respondent from jail. *Id.*

In 1987, Respondent Thomas Cooney and his wife, Lora John Cooney, filed suit in state district court against the State of Wyoming, the Department of Probation and Parole, Park County, Robert Mayor, and Chris White, alleging violations of civil rights under 42 U.S.C. § 1983 and violations of state statutes. All of the defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court dismissed all claims against Park County and Chris White, and dismissed all but the 42 U.S.C. § 1983 claims against the State, the Department, and Mr. Mayor. Respondents appealed to the Wyoming Supreme Court, which held that Petitioner White's actions in initiating the probation revocation proceeding were protected by absolute immunity. *Cooney I, supra.* Upon remand from this Court, the Wyoming Supreme Court reversed its stance and held in a plurality opinion that Petitioner's activities were not to be afforded such immunity. *Cooney II.*

REASONS FOR GRANTING THE WRIT

I.

THE WYOMING SUPREME COURT IGNORED THE FUNCTIONAL ANALYSIS TEST ENUNCIATED IN *IMBLER v. PACHTMAN*, AND MISAPPLIED THE HOLDING IN *BURNS v. REED*, WHEN IT RULED THAT PETITIONER'S ACTIVITIES IN INITIATING A PROBATION REVOCATION PROCEEDING WERE NOT ENTITLED TO ABSOLUTE IMMUNITY SIMPLY BECAUSE THOSE ACTIVITIES OCCURRED OUTSIDE THE COURTROOM AND WERE NOT UNDER THE DIRECT SUPERVISION OF A JUDGE.

In this case, the Wyoming Supreme Court was asked to consider whether a deputy county attorney's activities in using a perjured probation revocation petition to obtain a bench warrant, and in causing the probationer to be arrested and detained, were the functional equivalent of a prosecutor's role as an advocate in a criminal proceeding. In *Cooney I*, the court held that the challenged activities "were intimately associated with the judicial phase of the criminal process" and, therefore, were "functions to which the reasons for absolute immunity apply with full force," *see Imbler v. Pachtman*, 424 U.S. 409, 430 (1976), because probation revocation proceedings are, under Wyoming law, "an integral part of the judicial phase of the criminal process." *Cooney I*, 792 P.2d at 1293-1295, 1298.

Upon remand from this Court, a plurality of the Wyoming Supreme Court discarded the functional analysis test established in *Imbler v. Pachtman* in favor of a "place/time

of activity" evaluation. The court concluded that because some of Petitioner's activities occurred outside the courtroom and prior to court proceedings, they were more like legal advice than prosecutorial functions and not entitled to absolute immunity under this Court's holding in *Burns v. Reed*, 500 U.S. ____, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991). *Cooney II*, 845 P.2d at 362, 364-369. The Wyoming Supreme Court's focus on where and when the conduct occurred ignores the functional analysis test of *Imbler v. Pachtman*, and misapplies the holding in *Burns v. Reed*.

In *Imbler*, this Court enunciated a functional analysis test for evaluating the boundaries of prosecutorial immunity. This analysis requires examining a prosecutor's activities to see if they are "an integral part of the judicial process," "intimately associated with the judicial phase of the criminal process, and thus [are] functions to which the reasons for absolute immunity apply with full force." *Id.*, 424 U.S. at 430-431. The functional approach has been consistently utilized by this Court, including in *Burns v. Reed*, 500 U.S. ____, 114 L.Ed.2d at 559-565. The functional approach requires drawing lines between conduct which is advocatory in nature and entitled to absolute immunity, and conduct which is administrative or investigatory, which is afforded less protection.

While the decision in *Burns* distinguishes between prosecutorial conduct which is entitled to absolute immunity, and that which is afforded a lesser degree of protection, the line of demarcation drawn in the instant case is in the wrong place. The Wyoming court's conclusion that a prosecutor's conduct in obtaining a probation revocation petition is analogous to "the prosecutor's proffer of solicited legal advice to the police officer in *Burns*" and entitled to only qualified immunity, *Cooney II*, 845 P.2d at 364, rests on three incorrect assumptions.

The first erroneous assumption is that a prosecutor is not required to be involved in preparing a probation revocation petition. *Cooney II*, 845 P.2d at 364-365. The new Wyoming Rules of Criminal Procedure, adopted in the spring of 1992 by the same court that heard *Cooney I* and *Cooney II*, require a prosecutor to initiate the probation revocation proceeding. W.R.Cr.P. 39(a). Even if that rule were to be read to require only the prosecutor's appearance *in court* on a petition, it is obviously in the public's interest to have an officer of the court review a probation revocation petition prior to the actual court proceeding.

Next, the Wyoming court erred in categorizing this aspect of the prosecutor's conduct as discretionary and not at the "direction of a court." *Cooney II*, 845 P.2d at 365. The functional approach does not require that conduct occur in court or at the direction of a court to be protected: the question is whether the conduct is advocatory in nature. *Imbler*, 424 U.S. at 430-431. A prosecutor's conduct in filing a probation revocation petition is advocatory; it is far more akin to the filing of a criminal complaint (which is also discretionary in nature and occurs without "the direction of a court"), than it is to the giving of legal advice. In *Imbler*, this Court recognized that "the duties of the prosecutor in his role as advocate for the state involve actions preliminary to the initiation of a prosecution," *Imbler*, 424 U.S. at 431 n.33, and held that a prosecutor is absolutely immune for actions required to initiate a prosecution. Id., 424 U.S. at 431; *see also, Burns*, 114 L.Ed.2d at 561.

In addition, Petitioner's activities in this case occurred in the context of ongoing supervision of Respondent Thomas Cooney by the sentencing court. *Cooney II*, 845 P.2d at 370 (Thomas, J., dissenting), quoting Wyo. Stat.

§ 7-13-305 (1987). The activities did not occur prior to any initiation of judicial proceedings, but occurred after sentencing, while Respondent Thomas Cooney remained under the jurisdiction of the district court. *See* Wyo. Stat. § 7-13-305 (1987). Under Wyoming law, a probation revocation proceeding is "well within the judicial phase of the criminal process," *Cooney I*, 792 P.2d at 1293, and a prosecutor's activities in conjunction with that proceeding are advocatory in nature and entitled to absolute immunity.

Finally, the Wyoming Supreme Court erred in concluding that no safeguards, other than the threat of monetary damages, were adequate to protect persons such as Respondents in the context of probation revocation proceedings. *Cooney II*, 845 P.2d at 365-366. In *Cooney II*, the court focused on two factors as minimizing the prophylactic effect of the revocation hearing: (1) the petition was prepared "*prior* to the court involvement" and (2) the judge was never informed of the document's alleged deficiencies. *Cooney II*, 845 P.2d at 364-367. These factors do not support the conclusion that the judicial process does not provide adequate safeguards.

First, *all* probation revocation petitions are prepared "prior to court involvement," as are all complaints which initiate criminal proceedings under Wyoming law. The Wyoming Supreme Court has held that it violates the separation of powers for a court to be involved at the decision-making stage prior to the initiation of prosecution. *Petition of Padget*, 678 P.2d 870 (Wyo. 1984). The lack of court "involvement" is not a reason for removing the cloak of absolute immunity from a prosecutor's conduct in initiating criminal proceedings.

In addition, the functional approach does not require - indeed, does not *allow* - a decision on immunity to be

based upon the nature or contents of the documents filed or testimony presented. The functional approach focuses on the relationship of the conduct to the judicial system and its advocatory nature, *not* the content of any documents or testimony, nor the prosecutor's motive, intent or knowledge. In *Imbler*, the prosecutor's knowing use of false testimony was afforded absolute immunity. In *Burns*, the prosecutor's conduct in presenting a less-than-accurate factual basis to the court in order to secure a search warrant was also deemed protected by absolute immunity. These decisions emphasize that the absolute immunity afforded to a prosecutor's advocatory duties is not dependent upon the presiding court's knowledge of the truth or falsity of filed documents. *See also, Millspaugh v. County Dept. of Public Welfare*, 937 F.2d 1172, 1175 (7th Cir. 1991), *cert. denied* ____ U.S. ____, 112 S.Ct. 638, 116 L.Ed.2d 656 ("immunity that applies only when the defendant did no wrong is no immunity at all"); *Schrob v. Catterson*, 948 F.2d 1402, 1409, 1417 (3rd Cir. 1991) ("If any of the allegations of the complaint involve prosecutorial functions protected by absolute immunity under the principles enunciated in *Imbler* and *Burns*, they must be dismissed without reference to the type of behavior complained of."); *Kulwicki v. Dawson*, 969 F.2d 1454, 1464 (3rd Cir. 1992).

Under the functional analysis test, the judicial process itself is an adequate check on prosecutorial behavior which is advocatory in nature. *Burns*, 114 L.Ed.2d at 562; *Anthony v. Baker*, 955 F.2d 1395, 1401 (10th Cir. 1992). Wyoming law requires that there be a hearing before a judge to determine whether an individual's probation should be revoked. Wyo. Stat. § 7-13-305(c) (1987); W.R.Cr.P. 33(f)(1957). "[T]he judicial process is available as a check on prosecutorial actions at a probable cause hearing," *Burns*, 114 L.Ed.2d at 562, and is an adequate safeguard, " 'reduc[ing] the need for private damages

actions as a means of controlling unconstitutional conduct'." *Id.*, quoting *Butz v. Economou*, 438 U.S. 478, 512 (1978).

The Wyoming Supreme Court's inappropriate reliance on the place and time of the challenged conduct, and a court's supervision over such conduct, leads to the incorrect conclusion that a prosecutor's activities will be shielded by absolute immunity only when those activities occur inside the courthouse doors and in front of, or at the direction of, the court. This conclusion will hinder a prosecutor's willingness to critically review cases prior to the actual initiation of proceedings, which result will benefit neither the public, which needs prosecutors to promptly pursue miscreants, nor those who are charged with crime, for whom a prosecutor's pre- charging activities are crucial in assuring that only appropriate cases are filed. Proper application of the functional analysis test requires affording absolute immunity to the challenged activities in this case, since they "are ultimately associated with the judicial phase of the criminal process and are functions to which the reasons for absolute immunity apply with full force." *Cooney I*, 792 P.2d at 1298; *Imbler*, 424 U.S. at 430.

II.

THERE EXISTS A CONFLICT IN THE FEDERAL CIRCUITS REGARDING THE DEGREE OF IMMUNITY AFFORDED TO PROSECUTORS IN OBTAINING ARREST WARRANTS WHICH INITIATE REVOCATION PROCEEDINGS.

The Wyoming Supreme Court's decision also highlights a conflict which exists in the federal circuits regarding the level of immunity afforded to those who seek arrest or similar warrants to initiate proceedings. In *Malley v. Briggs*, 475 U.S. 335 (1986), this Court held that a police officer was not absolutely immune for seeking an arrest warrant. The question of immunity for seeking a search warrant was avoided in *Burns*, 114 L.Ed.2d at 559-560; *see also, Burns*, 114 L.Ed.2d at 565-570 (Scalia, J., concurring and dissenting). In reviewing this issue, the federal courts have drawn the line between absolute and qualified immunity in so many different places that the line of demarcation is now a blur, no more certain than a boundary created by the shifting sand bars of a river.

The Sixth and Tenth Circuit Courts of Appeal have held that a prosecutor is absolutely immune for obtaining an arrest warrant. *Joseph v. Patterson*, 795 F.2d 549 (6th Cir. 1986), *cert. denied* 481 U.S. 1023 (1987); *Lerwill v. Joslin*, 712 F.2d 435 (10th Cir. 1983). In *Schrob v. Catterson*, 948 F.2d at 1413-1416, the court afforded absolute immunity to a prosecutor's conduct in obtaining a seizure warrant as part of a forfeiture action. *See also, Ehrlich v. Giuliani*, 910 F.2d 1220 (4th Cir. 1990). The initiation of civil litigation has also been deemed entitled to absolute immunity. *Spear v. Town of West Hartford*, 954 F.2d 63 (2nd Cir. 1992), *cert. denied* ____ U.S. ____, 61 U.S.L.W.

3256 (1993); *Brummett v. Camble*, 946 F.2d 1178 (5th Cir. 1991), *cert. denied* ___ U.S. ___, 112 S.Ct. 2323, 119 L.Ed.2d 241; *Fry v. Melaragno*, 939 F.2d 832 (9th Cir. 1991).

Other circuits, however, have held that similar conduct was not entitled to absolute immunity, *McArdle v. Tronetti*, 961 F.2d 1083 (3rd Cir. 1992); *Mee v. Ortega*, 967 F.2d 423 (10th Cir. 1992), or have drawn distinctions between pre- and post-indictment warrants. *McSurely v. McClellan*, 697 F.2d 309 (D.C. Cir. 1982); *Liffiton v. Keuker*, 850 F.2d 73 (2nd Cir. 1988).

The Wyoming Supreme Court's focus on the place or time of the challenged activity, rather than on the functional nature of the conduct is similar to the "place of injury" analysis currently under review by this Court in *Buckley v. Fitzsimmons*, No. 91-7849, and underscores another conflict among the courts. While it has been stated that "the more distant a function is from the judicial process, the less likely absolute immunity will attach," *Snell v. Tunnell*, 920 F.2d 673, 687 (10th Cir. 1990), *cert. denied* ___ U.S. ___, 111 S.Ct. 1622, 113 L.Ed.2d 719 (1991), courts have extended absolute immunity to witnesses and others who conspired to present perjured testimony, *Miller v. Glanz*, 948 F.2d 1562, 1570-1572 (10th Cir. 1991); *House v. Belford*, 956 F.2d 711 (7th Cir. 1992), but not to a parole officer detaining a parolee pending a revocation hearing. *Mee v. Ortega*, 967 F.2d at 425-429. On the other hand, *Burns'* limitation on absolute immunity has not been applied to allow liability against a prosecutor who told a deputy sheriff to keep a defendant's family out of the courtroom. *House v. Belford*, 956 F.2d at 719 n.12.

The multitude of finely-drawn distinctions between conduct which is entitled to absolute immunity and that

which is afforded a lesser degree of protection, has left prosecutors with no direction, no clearly-defined parameters of protection. Conduct which in one circuit might be protected (thus leading to an early dismissal of a suit for damages) is afforded less protection in another circuit, depending upon which "hat" the prosecutor was found to be wearing, or how far he was from the courthouse door when he was wearing it. As the Fifth Circuit said in *Brummett v. Camble*, 946 F.2d at 1182, discounting the "two hat" argument:

> [T]he dual capacity argument focuses impermissibly on the officials' motivations. Moreover, the dual hat theory is a very loose concept that furnishes no rule of thumb for prosecutorial independence as the courts attempt to flesh out its ramifications. We perceive little good coming from such a theory and the potential for considerable mischief.

The conflict in the circuits begs for resolution by this Court. This case represents an opportunity for this Court to address the question left open in *Burns*, regarding the immunity to be afforded to a prosecutor in the initiation of a criminal proceeding.

CONCLUSION

For the above reasons, the Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari as to the question presented herein. Alternatively, the Petitioner requests that the Petition be held for consideration in light of this Court's pending decision in *Buckley v. Fitzsimmons*, No. 91-7849.

Respectfully submitted,

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